NATIONAL TENDENCIES AND THE CONSTITUTION.

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AT this time, in the midst of an underlying popular ferment and discontent, and in the common interest of our people's welfare, of the rights of property, and of our natural and continuous development as a *nation*, a plea is here entered for the national life and *constitutional* centralization, and for the only sane and effective regulation of wealth and its activities, and the correction of prevalent abuses, by the use of certain of the practically unlimited powers of the Federal Government. It is not intended, however, to seek a cure-all in legislation. That is a will-o'-the-wisp. It cannot too often be reaffirmed that the wrongs of business and the ills of humanity, which arise from the weakness of human nature, cannot be cured by statute. Nor is it the purpose to discuss any isms or panaceas, or to advance any new or radical ideas, or destructive criticism, for patience has been exhausted by merely academic debate; but it is the purpose to offer a few simple, concrete suggestions for real and practical remedies, operating in ways well understood. Of course, it is constantly insisted that all this is unnecessary, and that we need only force proper action on the part of the States. That assertion has a familiar ring, and it will be tested.

As against wealth and property—merely withdrawals from the common store—the people have determined to protect themselves from depredations; and wealth and the interests of property, which must find their only security in the respect and regard of the people, must win and entrench themselves in that regard by the service of humanity and the assumption of a proper share of the public burdens. An intelligent public opinion, however, in safeguarding the public interests, will insist that absolute justice

be measured out to all. Our hopes for the future, in that behalf, rest confidently upon the character of our individual citizens and upon the even-handed justice established by our institutions.

This existing spirit of discontent found among a majority of our people, especially in the East, is not hysterical, or otherwise impulsive or ephemeral. It is based on certain fixed ideas concerning the abuses of wealth, and of opportunities open to wealth, and concerning causes for the admitted startling increase in the cost of living—ideas which have been fostered by reflection, aided by the constant campaign of exposure and investigation maintained by our newspapers and the public authorities. The questions involved are no longer debatable. The conclusions which the majority of our citizens have formed on these questions are sober and deliberate, and have become a crystallized public opinion, by which, in our country, we must be governed. It is useless, and will be prejudicial, to attempt further discussion. The people state as a fact the existence of what they regard as nationally stultifying and individually crushing and grinding abuses. They demand remedies.

This unrest and discontent, in view of our extraordinary general prosperity, is certainly a phenomenon, and it is increasing, even among those classes in the community which are distinctly intellectual and leaders of thought and action, and which are never led or misled by mere demagogic clamor or journalistic charlatanism. Our boasted prosperity has benefited chiefly the wage-earner and the man of wealth. The great class of salaried and professional men has felt no corresponding improvement. On the contrary, hand in hand with prosperity has come a disproportionate increase in the cost of living, and this latter class—the most important element in our citizenship—failing to share proportionately in the increased riches of the times, has been sorely oppressed by this abnormal growth in the material, routine burdens of existence. Feeling that the hue and cry of the insincere, cheap and irresponsible elements of society is justifiable, such men have reasoned out the problem for themselves. When that part of our citizenship speaks, its voice must be heeded. And it has spoken. The recent elections, for instance, in New York and Massachusetts, have left, written large upon the wall, what may be called our latter-day warning of "*Mene, mene, tekel, upharsin.*" This we are bound to take to heart, for it is now seen

that the real forces in our democracy are already at work on this tremendous modern problem—the use and the abuse of wealth.

Our country stands for absolute equality in opportunity, and public opinion is right in its assumption that great aggregations of wealth, even when properly used, by virtue of their mere weight and momentum, necessarily tend to produce inequality, and, when misused, may even absolutely destroy, as, in many instances, they are said to have destroyed, all opportunity for individual and competitive effort.

The people are also weighed down by the conviction that wealth, though confessedly derived from the common store, and absolutely dependent for its security upon the good-will of the community, is rendering practically no service to society in return for its protection, and is bearing no proportionate part of the burdens of taxation.

Nevertheless, if we draw our inspiration from the past, and are guided by the signs of the times, it is evident that too much stress cannot be laid on the suggestion that much can be done to stem this tide of discontent, and to satisfy this existing public opinion, if the possessors of wealth, in wisely chosen ways, not only will return to the public service a fair share of their accumulations, but also will devote themselves to the creation of a leisure class, of wide culture, training and experience in affairs of state, whose lives shall be given to the public service and to the general welfare, and upon whom the workers of the community may learn confidently to rely for skilled and expert guidance in public affairs, and for an efficient, clean and decent performance of the duties of public office. This is the real use, as distinguished from the selfish abuse, of wealth. Let the gospel of service become the gospel of wealth, and purely obstructive distrust will give place to an uplifting mutual confidence. Indeed, conditions are rapidly improving. The cultured sons of wealthy parents are already entering politics and the public service, and securing the people's confidence. The dawn of a better day in public affairs is already breaking. No one can possibly overestimate the value, in this respect, of President Roosevelt's life and action, as an example, and of his personal force and initiative in what we may term this new life of the nation.

At the moment, however, in order fully to restore the people's confidence, something more is required than mere social and pub-

lic service. Wealth must be made to pay its way, and its acquisition, use and transmission must be regulated; but the people must be influenced to proceed slowly and conservatively. In our country, we do everything without deliberation and upon the spur of the occasion, and solve, offhand, all problems, however serious or novel. This is our national habit and our national fault, which, if allowed to control in this particular matter, may lead to the gravest consequences. Familiarity with the statutes and legislative methods of the States and the Nation during the last twenty-five years has led to the abiding conviction that the two greatest evils in our American life (they are grouped, and the superlative is used advisedly) are over-legislation, on the one hand, and hasty, ill-considered (or unconsidered) and improperly framed legislation, on the other. The first is the direct result of our dual system of Government, which, with its unnecessarily and absurdly frequent sessions of half a hundred lawmaking bodies, promoting ceaseless agitation and destroying calmness and deliberation, we have not yet learned to operate to advantage; and the second is due to, and is the natural product of, the uncultured and untrained character of our legislators and public men. We are now laboring and suffering keenly under this legislative incubus, which is increased by the large number of that worst of parasites on the body politic—the citizen who is a mere selfish politician without any proper conception of either private obligation or public duty. This situation is largely responsible for these present-day disturbed conditions of the social atmosphere; and yet it is but a passing phase. We are growing rapidly, and education, training and natural development will work out the obvious and needed remedies.

At the outset, it is proper to note that an unjustifiable general indictment has been made of accumulated wealth in corporate form, and of its alleged exclusive monopolistic privileges and franchises. We cannot prevent by law the union and association of wealth in corporations, for union and consolidation — the formation, for instance, under our Constitution, of a "more perfect union"—are of the very essence of our existence, and are in accordance with the course of nature. Without such association and combination, the extraordinary resources of our vast domain, for the lasting benefit of the farmer, the mechanic and the laborer, could never have been developed. As one of the

wisest members of the Supreme Court of the United States said, in writing for that court many years ago concerning these very suggestions:

"Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good have been made successful by means of these exclusive rights, and could only have been conducted to success in that way."*

It is, then, merely the abuses of these special and exclusive privileges, in the accumulation and employment of excessive wealth, of which our citizens justly complain.

The people have two agencies which they may employ to check and regulate such abuses—the one, the Nation, the other, the State. It is said that, in interfering in such matters, the Nation is trenching on "State rights," and that the States alone can act. This suggestion overlooks the fact that the *people,* the source of all authority in both State and Nation, are making their own choice of an agent, within the constitutional limitations which they have themselves set up, and that, in all matters which, like this, admittedly affect the "*general welfare,*" the people are now invariably turning to the National Government, created by them for the very purpose of promoting and protecting their general well-being.

In that most perfect statement ever made of the objects of all government, contained in the preamble to the Federal Constitution, *the people,* in stating their purpose and intent in forming this Nation, have finally and conclusively disposed of all such questions. In that brief paragraph they solemnly affirm that:

"*We, the people* of the United States, in order to form a *more perfect union,* establish *justice,* insure *domestic tranquillity,* provide for the *common defense,* promote the *general welfare,* and secure the blessings of *liberty* to *ourselves* and *our posterity,* do ordain and establish this Constitution for the United States of America."

As Chief-Justice Marshall long ago declared:

"The Government proceeds *directly from the people.*" "Its powers are granted *by them,* and are to be exercised *directly on them and for their benefit.*"†

The States are merely subordinate instrumentalities of the people.

* Mr. Justice Miller, in *Slaughter-House Cases,* 16 Wallace, at page 66.
† *M'Culloch* vs. *Maryland,* 4 Wheaton, at pp. 403 and 405. (1819.)

At this somewhat momentous period of our national existence, we are chiefly interested in this announcement of the purpose to "form a more perfect union," to "establish justice" and to "promote the general welfare." Union there was, then, but of separate entities and segregated communities, imperfectly joined. Union, the consolidation of thought and effort, was, however, the accepted foundation of the structure, and the primary purpose and desire were to make it "more perfect" and complete. Our fundamental law has thus embodied a recognition of the natural tendency to cohesion and consolidation, and of its value to human society as a whole. The union of wealth and of effort in corporate form is no less natural; but, whereas the people have protected themselves by their Constitution against the abuse of consolidation in governmental matters, there has heretofore been lacking specific and efficient protection in respect to industrial consolidations.

Accompanying the formation of this union, and immediately following it, were to come "the establishment of justice" and the promotion by each of the State communities, which, theretofore, had been seeking to advance its own particular selfish interests, of the "general welfare" of the whole.

This "more perfect union" of the fathers' dream is being realized. Through the radical upheaval of the Civil War—at which time we ceased to regard ourselves as a confederation, and became in fact, and called ourselves, a Nation—and by the vast increase, throughout the country, in the power of the press, in the activities of our commercial and agricultural life, and in the means of intercommunication furnished by the many extraordinary applications of steam and electricity, and lastly through the welding power of the Spanish-American war, we are rapidly approaching our national maturity, and are developing a complete homogeneity. This perfecting of the union has involved the voluntary elimination of all sectional lines and differences —we have almost been able to see them disappear, day by day— and the burial of alleged States' rights and of their selfish separate interests; and the wiping out of these lines of demarcation has left us, in these recent years, one people, absolutely united in purpose and in action. In short, the Nation, in the best sense, has now assumed all the powers and duties of *nationality*.

The national life really began with this self-renunciation—

shall we call it redemption?—of the States and of the people of the several States as distinct communities. In these latter days, it has been wonderfully rounded out. The obligation to serve bears as imperatively upon the Nation, in its international relations, as upon the individual in his social environment, and who will undertake to measure, in either case, the developing and refining influence of the faithful observance of that obligation, and of the golden rule, in personal and national conduct? In this respect, as a nation, we have always welcomed the inpouring immigration of the oppressed from all other lands, and have recently, with Hawaii, Cuba, Porto Rico, the Philippines, China, Japan, Russia, Santo Domingo and Morocco, in Central and South America, and in the conference of The Hague, still further kept the faith and carried the burden, and, assuredly, our bread will return upon the waters of life. The law of compensation, in its operation, is inexorable, but absolutely just. The Nation's sin will find it out, but the Nation's virtue will reap its everlasting reward. Our national provincialism, like the provincialism involved in the selfish assertion of States' rights, is dying, if not already dead. Peace to its ashes! We have now taken our place among the *nations,* and henceforth our responsibility is to civilization and the world at large.

Moreover, notwithstanding the dual nature of our government, due to the independent State and National sovereignties, the full preservation of which our welfare undoubtedly demands, we are now, as a matter of fact, after passing through the many embarrassments of our crude, provincial minority, duly recognizing our international obligations; for we are now ceasing to plead an absurd and belittling national disability in respect to State action, and, as a nation, are accepting our proper responsibility for our treaty obligations, and for the action or non-action of the individual States or the people thereof. Internationally, we are now acting as a nation, and not as a confederation or group of independent and separate sovereignties. The States cannot have international relations or recognition. The Nation alone can create treaty rights and obligations; and these, as the supreme law of the land, must, under the Constitution and in the nature of things, be controlling and enforceable throughout the national domain, and within the jurisdiction of each State.*

* See *Ware* vs. *Hylton,* 3 Dallas, 199, 236–7.

Then, too, we are now witnessing, in every-day experience, constant appeals to the national power. These are often attributable, it is true, to efforts on the part of the States and the people to promote their selfish and material welfare, but love of country is at the bottom of it all. Even spiritual progress is frequently dependent upon, or due to, action dictated by the most selfish and material motives. Whatever their real motives may be in particular cases, the people are now freely committed to the national idea and a centralized form of government, and we are thus sweeping onward with the strength of united effort to our accepted place in the world's history and the fulfilment of our lofty mission in the unprecedented advancement of humanity. Increased love of country, as the dominating motive, will surely follow.

In the light of this national growth, and of these national tendencies, when we ask, Does the tariff need revision? Do individual wealth, its acquisition and use require further regulation? Do the growth of corporations, their income, franchises and other business activities require controlling action? we do not seek the answer in a consideration of what may best suit the interests and desires of Massachusetts, New York, Texas, California or Alaska, alone, or of any one section, whether North, South, East or West, but in the determination of what is best for the "*general welfare*"—for the commonwealth—for the promotion of which this Government was organized. At this late day, it does not seriously interest us to learn what particular view, with reference to her own selfish interests, California may entertain concerning the Japanese question, or Massachusetts in respect to the doctrine of reciprocity, for it is folly longer to discuss selfish State purposes or selfish State interests. They do not exist—at least, when we are discussing measures which necessarily must affect our people as a whole. With this renunciation of all selfish interests by the States, we are entering upon a new and inspiring era in the higher development of the Nation. It is not too much to assume that, in the present temper of our people, they are prepared, in all trustfulness, and within the constitutional limitations which they have themselves prescribed, and which they may enlarge at their pleasure from time to time, to surrender to the Nation, as far as practicable, substantially all such "powers" as have been deemed to be reserved to the States and the "people"

by the Tenth Amendment to the Constitution, so far, at least, as such surrender may be necessary to carry us forward to a perfect and effective union as one Nation.

State rights, then, as formerly interpreted, are no longer insisted upon. They are gone, and forever. This is not a theory or subject for debate. It is an existing condition, a fact, and must be accepted. The phrase "State *rights,*" or "reserved *rights* of the States," indeed, always involved a misnomer. The Tenth Amendment reserved "*powers*" to the "States respectively, or to the *people,*" and whatever "powers" were thus reserved to the States, they, in turn, had always derived, primarily, from the *consent of the people,* the source of all right, power and authority. "Rights," in the proper sense, the States never had. As governmental agencies, they had certain "*powers,*" conferred by the *people,* and reserved by the Constitution.* Such powers are revocable by the authority conferring them—here, the people—but the essence of a right, in this broader sense, is its inalienability, and such rights the States did not, and do not, possess.

State pride, also, like the former eloquent appeals for "State rights," is, fortunately, a thing of the dim past, and, in the light of what has already been said, must be deemed to be a relic of barbarism, whose advocates, in the irresistible onward march of the Nation, the people have finally sent to the rear. There is no longer any pride of State, in the old sense, to stand in the way of national growth, or any peculiar homely interest in State welfare. The great, throbbing people of this land are paying heed only to the interests of the whole Nation, as a single entity, for whose well-being they make their daily invocations. Prayers for the State one almost never hears, but prayers for the Nation, always. The past has buried its dead, and the strict constructionist of the Constitution has had his day. This element, like every other obstacle to national growth, has been either sloughed off or outgrown, and the natural laws, governing growth and development, centralization, consolidation and union, have taught the people

* "The *powers* the *people* have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the *people,* and can be exercised only by *them,* or upon further grant from *them.*" (Mr. Justice Brewer, in concurring opinion, in *Turner* vs. *Williams,* 194 U. S., at page 296).

"There can be no limitation on the power of *the people of the United States*" (*Ware* vs. *Hylton,* 3 Dallas, 199, at page 236—United States Supreme Court in the year 1796, by Mr. Justice Chase).

to seek and to find, within the Constitution, those fundamental principles which not only sanction and justify, but actually encourage and promote, the greatest conceivable extension of the national territory and the national functions. The dead letter may be that of an eighteenth-century constitution, now confronting twentieth-century conditions; but the living spirit is in harmony with the youth of our people, expanding and developing with their needs. What the people really seek within the four corners of their charter they invariably find. Amendment of the letter may hereafter occasionally be required; but to refer to it as an antiquated and inadequate production of the eighteenth century is to ignore the eternal life of the spirit which the genius of the framers breathed into its phrases.

And so it is that we now hear of the "reserved rights of the States" only as an incident in the discussion of long-desired possible extensions of the national functions under the Constitution. In short, the States are, in these days, treated by the people only as so many uninteresting and cumbersome, but necessary, local governmental agencies for home rule and the administration of purely local affairs.

The people, influenced by the demonstrated inefficiency of the State governments in the more important matters affecting their "general welfare," have tacitly permitted, and are, now, constantly promoting the assumption by the central authority—the National Government—acting within constitutional limitations, of a great part (not purely local in nature) of the real police powers and functions of government. This is significant. In it we see both the modern craving for sincerity and efficiency in public service, and the naturally increasing demands upon centralized power arising from the rapidly growing homogeneity of our people.

In our daily life there are many striking illustrations of this natural growth of the national life, and many evidences of the constant study of the people, and of the separate States, to increase, under the Constitution, the power and efficiency of the united people as a Nation. In action of this nature, we find an open confession of weakness and helplessness on the part of the States, quite conclusive in support of the demands for centralized action wherever constitutionally possible. We refer, particularly, to the repeated and persistent attempts, on the part of

the different States, to secure *uniformity* of State legislation and action in all matters (insurance, divorce and commercial law, for example) admitted to be, perhaps exclusively, within State jurisdiction, and in respect to which the conflicting practices of forty-six different States have produced evils seriously interfering with the life and growth of a people, now united in the pursuit of common interests. Speaking generally, whenever the subject-matter of legislation covers two or more States, such uniformity of regulation becomes essential, and it can be absolutely secured only through *national* control, exercised under the Constitution or an amendment thereof. That is the national tendency, which, as the generations come and go, will unquestionably be completely worked out.

Centralization itself, indeed, is but the natural striving of the people for *uniformity*—for real and "perfect union" and mutual trust, as distinguished from the disintegrating and devitalizing selfishness of independent State action. The separate State sovereignties, revolving about the national centre, are, through the natural operation of cohesion and centripetal force, gradually being brought together on all subjects of common interest. Mutual trust and confidence, mutual service and interdependence, are working out the golden rule in interstate relations and activities. Truly, their provincial and selfish bachelorhood has been succeeded by the national intermarriage of the States, and upon the fruition of that marriage the welfare of the world now hangs.

The calls upon the Nation, for the performance of particular duties bearing upon the "general welfare" of the people, are numerous—as, for instance, frequently, for the preservation of peace within State boundaries, the establishment of an adequate quarantine, the promotion of irrigation and forestry, the prevention or remedying of loss and damage due to extraordinary catastrophes within the States, the universal enforcement of the national anti-trust law and other Federal interstate-commerce laws, the aid and advancement of memorial and historical celebrations and expositions by the States, the development and enlargement of agricultural pursuits within the several States (and, in that connection, we may note the recently reported request for the destruction, for example, in the South, of the boll-weevil in the cotton-fields, and, in New England, of the gypsy-moth pest)—although many of these matters may, at times, decidedly strain

the expressly granted powers of the National Government, and although, very often, they directly affect State interests and property rights of individuals secured by State franchises and laws.

What is more to the point, it has now become self-evident that, inasmuch as this problem of wealth of necessity affects most seriously the "general welfare" and "domestic tranquillity" of the whole people, it cannot be dealt with satisfactorily by the several States, but must be cared for by the nation itself, which was constituted for the express purpose of dealing with subjects of that nature. In that respect, the Confederation was a failure, for that experiment demonstrated that nothing less than the entire people, united as a Nation, can possibly cope effectively with such conditions. Accordingly, we find that the attempts of the States to regulate so-called "trusts" or monopolies have, for this reason, been abortive, and, as the President has said, with much justice, it was mere "sham and pretence" to expect anything else. It is both physically and constitutionally impossible for one State to legislate or act for the whole, and, besides, each State has its own special and selfish interests to subserve. Texas, for example, one of the parents of anti-capitalistic legislation, having attempted, like Illinois in another connection, by every sort of device and indirection, to except her own agricultural and cattle interests from the operation of her anti-trust laws, when informed by the courts that she had not legally made, and could not make, such exceptions, at once lost much of her ardor in her anti-trust activities.

That uniformity and effectiveness of regulation, which can come only from national intervention, is made necessary by the constant shocks to business produced by these fragmentary attempts of the different States to enforce their many different anti-trust laws, of which, it is believed, there are three or four score in existence. All of the important business of the country is now interstate, demanding uniform laws and regulations. It is, in large part, conducted by foreign corporations—that is to say, corporations organized in States other than those in which they are found from time to time carrying on business. Many of these foreign corporations are called "trusts." Startling as it may seem to the lay mind, such corporations, formed in one State, have, under the Constitution, no absolute right to enter

and do business in such other States, and, in carrying on business there, act only in the exercise of a mere license, which all States, other than the parent State granting the charter, may revoke at pleasure. It has even been seriously argued, if not judicially determined, that such corporations and their property, in States other than those of their origin, may, under certain circumstances, become bound by statutes unconstitutional as to all other persons; and it is settled that no corporation is entitled to any of the privileges or immunities of citizens. Bearing in mind the magnitude of the property interests represented by such foreign corporations in the several States—for, probably, the larger part of the vitally important business of the country is now being conducted by such foreign corporations—we at once see that, under existing circumstances, their security, like that of the corporate interests of England, rests only upon the conservatism and good-will of the people—here, the majority of the voters in the several States.

It is practically impossible for these great corporate interests to comply with the widely diverging requirements of the laws of forty-six States, which are constantly changing, and are applied with no uniformity as to either procedure or subject-matter. The "establishment of justice," for which this Union stands, demands that these great interests, many of them vital to the people's welfare, be protected by that uniformity of regulation which can come only from the Nation; and that same justice, for the protection of the people themselves, requires that this use of corporate wealth by foreign corporations be *effectively and uniformly* controlled. As it is, substantially all that any State can do is to tax such corporations, in the form of license fees, and in other ways, or exclude them from its boundaries, besides imposing, for the violation of State laws, a fine, which, for present purposes, we may assume to be confiscatory. All this, however, is plainly inadequate, for the corporations (or so-called "trusts") excluded by Massachusetts, Missouri or Texas, for example, will continue their business in adjoining States (which, from considerations of material gain, may purposely refrain from adverse action), and, acting by other agencies, or under other names, will even return to the originally hostile States. There have been many instances of this procedure. By this crude enforcement of inadequate laws, the people, acting through the agency of the

States, practically, thus far, have accomplished nothing toward the solution of this problem of wealth. Here, then, is a point at which the people are beginning to insist upon uniformity of remedial control, which the Nation alone can furnish.

This archaic and wholly unpractical and incapacitating doctrine as to foreign corporations operating within the several States is plainly unjust to both the corporations and the people. The corporations themselves would enthusiastically welcome the uniformity of national regulation — and this, for the sake of the uniformity, and not by reason of any assumed comparative facility in controlling the action of Congress, as a single legislative body. Such facility does not, and cannot, exist, and there is no such danger to the body politic. A large part of the wealth of the country is under the control of, and is produced by, these very foreign corporations. Looking to the common advantage and the general welfare, the people demand, indeed have determined, that the acquisition, use and distribution of that wealth should be controlled. On the part of the corporations, the time has come when their best interests require uniformity in such control. How shall it be accomplished? And how shall the individual wealth, amassed through the use of this corporate wealth, be controlled in respect to acquisition, use and transmission? These questions are of great moment, and, as indicated, State action cannot be effective, and, indeed, has been demonstrated to be, at the best, utterly ineffective.

In any consideration of the proper ways and means at the command of the Nation, with which, under present conditions, to meet this possible emergency in our national life, due to this spirit of discontent, it must be borne in mind that the evident folly of expecting, or assuming, that adequate remedies can be furnished by the individual States is no greater than is the folly of the assumption that so-called "trusts," in the form of incorporated aggregations of excessive wealth, are mainly responsible for the conditions complained of, and that a few penalties, more or less, imposed upon them, perhaps accompanied by their dissolution and the punishment of their individual officers, will remedy the whole evil and satisfy the public desire. Nothing could be further removed from the fact. It is possible, by these and other methods, to regulate, to some extent, the abuse by wealth of its opportunities, but the regulation, to be effective, in

the estimation of our people, and to be fair to the interests of all citizens, must be so adjusted that it will regulate the interstate business, not only of plethoric incorporated wealth, but also of associated, partnership or individual wealth, as well. Regulation, to be such in substance and not merely in form, must operate upon all interests, whether individualized or associated.

The "anti-trust" crusade has never been satisfactory, in either motive or result. It has been, heretofore, always more or less spasmodic on the part of both the State and Federal authorities, and has been aimed only at the alleged abuses of opportunity by wealthy corporations. On the part of the States, prosecutions, it is believed, have been dictated usually by selfish or political considerations, or by the cupidity of petty prosecuting officers entitled to a share of the penalties. There has been no disinterested, whole-hearted, earnest and systematic effort to discover and remedy real abuses, and no effective step has been taken to reach the individual, alone or in association with others. Until individual wealth is reached and regulated, little can be accomplished in satisfying the demands of the people.

We must never lose sight of the fact, for it is a fact, that the dissolution of a few great corporations, or combinations of corporations, will not, and cannot, even seriously curb the evil sought to be controlled, for the reason that the property of the corporations cannot be taken from them, except in the form of *ordinary* penalties (the law will not tolerate excessive, unusual or extraordinary fines, forfeitures or punishments, or confiscation in any form), and that the dissolution of the combination or corporation merely means the formal and nominal subdivision of the combined wealth, and the organization of new corporations by the same individual owners. Or, if confiscation of property be indulged in (Missouri now claims the right), the property, unless physically destroyed, will always return by purchase, directly or indirectly, to the original interested individuals. That is the uniform experience in such matters. This natural course and order of things cannot be seriously obstructed by law. The result of the Northern Securities dissolution—greatly adding to the wealth and opportunities of the individual constituents of the combination—and the equally ineffectual attacks on the Standard Oil Companies, are unanswerable illustrations in point. The actual ineffectiveness of these methods of procedure is only fully

appreciated by those having competent knowledge of the situation. They only serve to scratch the surface or to stir up muddy waters. Such results can never satisfy the people, now thoroughly aroused, and will no longer even serve the purpose of political plays to the gallery. These methods will, however, without producing substantial results, needlessly inflame the worst passions of a certain section of the populace, and in that way the sober judgment and purpose of the great majority of our citizens will be defeated. In short, incorporated wealth is but a means; and, to reach the difficulty, we must find the individual organizers of the corporations, whose great wealth has been combined in that form, so that, whatever the *form* of its use, that wealth, in its substance, wherever employed, will be regulated in its use and made to bear its proper burdens. Toward the accomplishment of that end, it is at once seen, the regulation of corporations is but a step. What, then, can we properly do to reach the individual, the association and the partnership, as well—the real users and abusers of wealth?

For one thing, the rights of property must be respected, and Anglo-Saxon traditions on that head must be observed. Life, liberty and property are alike protected by constitutions and by laws. Under our institutions, property is almost as sacred as life itself. We can never deprive a citizen of his fundamental right to acquire property; and, even conceding the recognized power, it is not in the nature of things that we should ever deprive him of the ability and capacity to transmit at least a large portion of the property acquired. The right of acquisition and the ability to dispose of property furnish the necessary selfish motive power and incentive for human development. A law fundamentally impairing either would affect each citizen in a vital degree, upset the social structure and disrupt the State itself. It has been well said that the right to transmit property has a tendency to make of a man a good citizen and a useful member of society, prompting him to deserve well of the public, when he is sure that the reward of his services will not die with him.*

It is, therefore, the suggestion of a merely academic proposition, the prompting of a vivid imagination, to say that the States have the abstract power to prevent the transmission of property by will or upon intestacy. That power will never be exercised. We

* 2 Blackstone's Commentaries, page 11.

have passed beyond the era of semi-savagery when it might have been called into play. The right to acquire and to use is unlimited, except as controlled by taxation and the requirements of the public use. The transmission of what has been acquired will, as a consequence, always be left practically intact, except as regulated and controlled in respect to manner and amount, and as limited by taxation.

It is, however, evident that the creation and increase, by different methods of use, as well as the transmission, of individual wealth, must be regulated—all this in the interest of its possessors, as well as of the public; for, as we have said, on the consent and action of the people at large must, in the last analysis, depend the security of wealth.

In the first place, because involving this whole subject, our system—or lack of system—of Federal taxation should be scientifically overhauled and remodelled by a commission of qualified experts. This is of the essence of the situation, and its importance cannot be over-emphasized. The time for haphazard taxation, through the tariff or otherwise, has passed. A proper use of the taxing power, for the "general welfare," coupled with an exercise of the plenary interstate-commerce power, will remedy most of the evils complained of from time to time.

The greatest source of discontent, even among the majority of our citizens who believe thoroughly in the principle and system of protection, is the existing tariff. Their complaint is a just one, for, where protection for several important industries long ago ceased to be necessary, there have been built up, in the name of the protective tariff, special privileges on which great capitalists have fattened, under the very eyes, and at the sore expense, of our citizens as domestic consumers. When, in the ordinary course of business, and as a matter of daily routine, the domestic manufacturer regularly sells his product in foreign markets for a sum substantially less than his price to the home consumer, under similar circumstances and conditions, in order to maintain the high-tariff price in the home markets, originally established and acquiesced in a generation ago for the benefit of infant industries, it is high time that something be done, since the difference between these prices, plus freight and other items, represents the voluntary contributions of our citizens to the already overgrown surplus-capital of the manufacturer.

That method of using wealth has become an abuse which the American electorate, now well informed on the situation, will no longer tolerate. Let the protective tariff, as a system, stand, by all means; but let the Republican Party remove these abuses. Let an end be made of these shocking special privileges, which are plainly, day by day, adding to the wealth of the few. The people are watching and waiting. If one agency refuses to act, another will be made to act.

Again, while watching the inordinate growth of mere surplus wealth from such unjustifiable tariff abuses, the people are confronted by an extraordinary increase in the cost of the necessaries of life. The press and public officials have made superficial references to this latter fact, and reasons for an ordinary and temporary increase in the prices of many things are apparent; but no attempt has been made to trace the cause of the almost intolerable burden of the permanently enhanced cost of most of our necessary food-supplies. The people, however, have been thinking. It is believed to be the fact that never before in human history has the practice, condemned of old, of forestalling, engrossing and regrating in articles of prime necessity (that is to say, the monopolistic purchasing, in advance of market requirements, and the storing, of an entire food-supply, with a view to the creation of a future stringency, and a consequent artificial market with an artificially enhanced retail price) been carried to so diabolically perfect and scientific a consummation as at the present time. The cold-storage plants of the country, supposed to be "trusts" of the first magnitude, are believed to be wonderfully complete, and into their capacious maws, it is understood, are poured substantially entire supplies of vegetables, fruits, meats, eggs and fish, to be doled out at times and prices arbitrarily fixed to suit the pleasure and the pockets of the powers in control. The foreign markets, in order to maintain domestic prices, are favored with shipments of any surplus supplies. The results are seen in our current high prices, and the distinct inferiority of our raw-food supplies. This is a crying evil, and, if we do not pay heed to the conditions, the passions of the people may be unduly aroused. New legislation is needed. Speculation in food products should be made impossible. Let us learn the truth concerning this matter. Let the whole cold-storage business and

the laying up of our food-supplies be carefully investigated, and then wisely regulated, under both Federal and State laws.*

Next in order should come, in the interest of the corporations and the public alike, a complete system of Federal control of corporations doing an interstate business, which means substantially all corporations doing any important part of the business of the country. The Supreme Court of the United States will eventually be called upon to determine whether, in the exercise of the power to authorize and require the incorporation under Federal laws of all corporations engaged in interstate commerce, Congress may, at the same time, confer upon such corporations the power to manufacture and produce within the States. Much may be said in favor of the contention that the latter power must be regarded as a necessary incident of the former—as a means to the end—since there can be no commerce without production and manufacture, the basis of all trade and the first step in commerce itself. It is said that, unless Congress can regulate the first step, and this means to the end, it cannot effectually exercise its power of control. While that is probably not true, it is to be hoped that a scientifically framed Federal corporation law may be adopted and sustained. Operating uniformly throughout the country, and offering to the public opportunities for effective regulation, such a law would, as we have said, be welcomed by all corporations, and would be a boon both to them and to the people. Whether Congress may empower corporations to manufacture and produce within the States or not, it is clear that the privilege to engage in interstate commerce may be conditioned upon incorporation under Federal law, and the submission to Federal regulation, such Federal incorporation to be *supplemental and in addition to incorporation under State laws,* which may confer original powers to manufacture, produce or engage in other business. This is not an unusual expedient. The corporation will then be protected in all its interstate relations by both charters, and in all its interstate and foreign relations by its Federal charter, in this way avoid-

* In advance of an investigation, it would be unjust to pass final judgment in this matter, and what is here said only expresses a belief and understanding. Nevertheless, the very nature of the subject and its intimate relation to the well-being of our people create a necessity for a prompt and searching inquiry. The Agricultural Departments and penal statutes of the States are believed to be utterly ineffective.

ing the absurd embarrassments resulting from the foreign-corporation doctrine as now understood and administered.*

Whatever may be possible in the matter of Federal incorporation, it is clear that Federal control and regulation of all corporations, associations, partnerships and individuals doing an interstate business may be exercised and enforced through the medium of a required license for the conduct of such a business. Such a license may, as a condition precedent, require compliance with all of the restrictive regulations which Congress may see fit to impose. There is practically no limit to the control which the Federal authorities may thus exercise over the affairs and conduct of corporations, including all of the great corporations or so-called "trusts," for they are necessarily all engaged in interstate commerce.

This brings us to the really effective regulation of the use and transmission of all wealth, both corporate and individual—indeed, there is hardly a subject-matter that cannot be regulated—through the exercise, for the "general welfare of the United States," of the *taxing power* of the Federal Government. For

* Mr. Pinkney, in his argument in *M'Culloch* vs. *Maryland*, 4 Wheaton, at page 381, said:

"Has Congress, abstractedly, the authority to erect corporations? This authority is not more a sovereign power than many other powers which are acknowledged to exist, and which are but means to an end. All the objects of the Government are national objects, and the means are, and must be, fitted to accomplish them. These objects are enumerated in the Constitution, and have no limits but the Constitution itself. A more perfect union is to be formed; justice to be established; domestic tranquillity insured; the common defence provided for; the general welfare promoted; the blessings of liberty secured to the present generation, and to posterity. For the attainment of these vast objects, the Government is armed with powers and faculties corresponding in magnitude."

And again, at page 384:

"The State governments cannot establish corporations to carry into effect the national powers given to Congress, nor can Congress create corporations to execute the peculiar duties of the State governments. But so much of the power or faculty of incorporation as concerns national objects has passed away from the State legislatures, and is vested in the national government. An act of incorporation is but a law, and laws are but means to promote the legitimate end of all government — the felicity of the people."

In accepting the principles thus expressed, and in referring to the enumerated powers of the Government, Chief-Justice Marshall, in the same case, said (at page 407):

". . . We find the great powers to lay and collect taxes; to borrow money; *to regulate commerce;* to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and *no inconsiderable portion of the industry of the nation*, are entrusted to its Government."

the ineffectiveness and wastefulness involved in the irreconcilable confusion arising from the attempts of forty-six different State jurisdictions to regulate, by taxation and otherwise, a single business, we may substitute one central authority, representing the whole people, with all of whom, it may be assumed, all of the great business in question is conducted.

The taxing power of Congress is unlimited, except that it cannot tax exports, and that direct taxes must be apportioned and indirect taxes must be uniform. It is to be exercised not merely to pay "debts" and provide for the "common defence," but for the "*general welfare.*"* Speaking of the Federal power to tax, the Supreme Court has recently said:

"The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is *not only the power to destroy, but it is also the power to keep alive.*"†

The taxing power may be exercised through the medium of a license fee, or, if there be a valid Federal corporation law, a regular corporation tax, as to corporations, and a license fee, also, as to all partnerships and associations. It would also be per-

* Constitution, Art. I, Section 8, Cl. 1.

† *Nicol* vs. *Ames*, 173 U. S., at page 515.

It is well to bear in mind the utterances of Chief-Justice Marshall on the subject of taxation in *M'Culloch* vs. *Maryland*, 4 Wheaton, at pp. 428 and 431. He there said:

"It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it. The only security against abuse of this power is found in the structure of the Government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

"The people of a State, therefore, give to their Government a right of taxing themselves and their property, and as the exigencies of Government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse" (p. 428).

. . . . . .

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create . . . are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government" (p. 431).

fectly feasible to lay a license tax on individuals doing an interstate business, graduating it according to the amount done. This tax or fee would be in addition to the other requirements prescribed by Congress as conditions for the issuance of a license.

Not only a license fee for the privilege of engaging in interstate commerce, but a graduated income tax has been suggested—the chief burden to be placed upon income derived from investments (taxing it, with the corporations, at its source), as distinguished from earned income, and the whole to be so graduated that the larger incomes shall pay the larger tax. The tax should reach practically all of the people, and thus add to their interest in government. It should begin with small incomes, as small, perhaps, as $300—on which the tax should be comparatively trifling—and should recognize few, if any, exemptions. Substantially all of the shockingly unconscionable exemptions of the last act of 1894 should be abolished. They made of that act almost a scandal. And why should we not have such a tax? It is *perfectly constitutional,* even if it be universally applied, provided it be levied by the rule of apportionment, and be divided among the several States, as in the case of all direct taxes. So the Supreme Court of the United States has declared.

The Constitution provides that:*

"Representatives and direct taxes shall be *apportioned among the several States* which may be included with this Union *according to their respective numbers,* which shall be determined by adding to the whole number of *free persons, including those bound to service for a term of years,* and excluding Indians, not taxed, *three-fifths of all other persons.*"

And that:†

"No capitation or other direct tax shall be laid unless in proportion to the census, or enumeration hereinbefore directed to be taken."

In the interpretation of these clauses, the Supreme Court, not disputing the validity of income taxes in general, merely condemned the last income-tax act of 1894 *because it was not levied by the rule of apportionment.* There has been much misconception on this point. It has been loudly and passionately proclaimed that the courts have declared all income taxes to be unconstitu-

* Article I, Sec. 2, Cl. 3.
† Article I, Sec. 9, Cl. 4.

tional. Nothing could be more misleading. Income taxes, as such, have always been upheld. This last income-tax law was condemned, because not laid, *in form*, as the Constitution requires.*

It is true that an income tax, as a direct tax, Congress may hesitate to levy, because the rule of apportionment, in accordance

* The Supreme Court of the United States, in passing upon the law of 1894, applied certain ancient and fundamental principles, which, now that both lay and judicial minds are no longer swayed by the passion of the hour, are recognized as fixed and immutable, and the applicability of which is admitted to be beyond the possibility of further debate. There has, however, been much conflict as to the application of certain precedents, but that can have nothing whatever to do with the conclusive effect of the principles applied in this latest case.

The Court merely held that, in respect to both real and personal property, a tax on the income thereof was a direct tax on the property itself; for, if you take of the fruit of the thing, you necessarily take, to that extent, of the thing itself. To lessen the use or the fruits of property, is directly to take a part of its value. As a direct levy upon property, therefore, the tax was held to be a direct tax, like any other property tax, as contradistinguished from a mere indirect tax, in the form of an excise tax, or duty. As a direct tax, it should have been levied by the rule of apportionment prescribed by the Constitution. Congress failed to provide for this *form* of levy, and for that failure of Congress, as to that particular law, it was necessarily held to be unconstitutional—a perfectly natural and proper outcome, which ought never to have excited comment, much less the intemperate, inconsiderate and disgraceful criticism of the judiciary with which we have become familiar. Such criticism, which, even to this day, is still heard, must charitably be assumed to be based on utter ignorance of the points involved and of the meaning of the decision of the Court. Indeed, had the criticism been technically justifiable, the decision having been made by judges whose moral character and whose personal motives and actions were beyond all possible criticism, no such comment should ever have been heard in an Anglo-Saxon community. Judicial action, taken in good faith by an upright judge, should never, under our institutions, be made the subject of general or popular criticism. This absurd criticism of the income-tax decision—frequently heard in high quarters—has simply served to cause needless grief and sorrow among that great majority of our fellow citizens who fondly cherish the justly high and immaculate repute of that greatest of Courts—the mainstay of our institutions—as the most precious possession of our beloved country.

The coldly deliberate and wholly conclusive legal argument (accepted by the majority of the Court), in support of the application of those principles, which really worked this necessary judicial condemnation of the income-tax law of 1894, although constituting the subject-matter of one of Mr. Choate's most brilliant oral arguments before that Court, was, in fact, framed in a brief by that ablest of legal minds at the American Bar, Mr. Charles F. Southmayd, of New York, the long-time partner of Mr. Evarts and Mr. Choate. He is unknown to the public at large, but for years, prior to his retirement from active practice, in 1883–4, his associates and the courts had learned, almost as a habit, to place absolutely implicit confidence in the conclusions formulated in his arguments. It is fitting that some passing note, at least, should be made of his connection with that great case, and of *his complete responsibility for the argument which prevailed.*

with the rule of representation, under the census, originally designed for the protection of the South as against an undue apportionment, based upon its total slave population, will, in the judgment of the South, due to that same population, now free, bear more heavily, in proportion, upon that section than upon the other sections of the country, and also because the Middle and New England States and the great Middle West will continue to insist that, owing to the accumulations of wealth within their borders, they will be called upon to pay an unfair amount of such tax. Still, if the people really want, and insist upon, an income tax, it will unquestionably be levied and collected. That is the sole test—the people's will and behest. If it be real and expressed, their command will prevail

There is no practical difficulty in apportioning an income tax as a direct tax. The States may pay their quotas, raising the funds therefor as they please; or the Federal Government, such payment failing, may proceed to collect in each State the portion levied therein, in the ordinary manner prescribed for the collection of an income tax.

And, then, an inheritance tax is suggested. And why not that, also? Of both income and inheritance taxes the President has spoken, and no one need be startled by the suggestion. Both are plainly constitutional, and have been sustained by the Supreme Court of the United States—an income tax, even though graduated and levied on all incomes, from all property, provided it be levied by the rule of apportionment, and an inheritance tax, even though graduated and levied upon the transmission of all property, by the rule of progression, so that the larger the estate and the amount of property transferred, the greater will be the tax it shall be made to pay.

These matters have been discussed and are reasonably well understood. But now let us turn to a somewhat new and necessary departure. We may regulate the transmission of wealth, and even its possession, by these latter taxes. How can we, within the four corners of our Constitution, otherwise control its *accumulation?* Let us see. We must reach the individual, the association and the partnership, as well as the corporation, and so work out justice and a "square deal."

The power of Congress to regulate interstate commerce is, in modern interpretation, almost limitless, but we need not go to

the limit. We have seen that the interstate-commerce license fee is a practical suggestion. It is a franchise tax, and Congress may constitutionally *measure the amount* of the tax or fee in any arbitrary manner, quite at its pleasure. Let Congress combine the essential features of the franchise or license fee with those of a graduated and progressive tax. Let the interstate-commerce license fee be imposed on *all* corporations, individuals, partnerships or associations, and let it be *measured* by the total amount of the *gross sales or gross receipts* in the business of each. At the same time, let the rate of the tax or fee be graduated in accordance with the amount of capital employed, directly or indirectly, in the business, and let the rate advance, in each case, progressively, with the amount of gross sales or receipts, to the end that the small business may not be unduly or unjustly burdened. The tax, in each case, will thus depend entirely on the extent and power of the capital employed and the amount of the business done. While the chief business of the country is interstate, this *measure* of the tax, for the privilege of conducting interstate commerce, should be based upon the total gross sales or receipts *of the entire business, wherever conducted.* No avenue of escape should be left for the elusive capital employed. It should include all capital represented by capital stock, and all borrowed capital represented by bonds, certificates of indebtedness, notes, or any other obligation of the owner of the business. It should include all capital directly or indirectly represented in a common interest or ownership, through stockholding, directly or through others, or allied or subsidiary corporations or concerns, all of whose gross sales or receipts should also be included, in arriving at the total tax upon the real proprietor of the business. In this way the carefully drawn statute would prevent the securing of a lower rate of tax upon the smaller capital of a subsidiary business. The amount of *gross* sales or receipts should be taken, in order to prevent the reduction of the tax by the deduction of padded charges in arriving at so-called net sales or receipts.

This classification, by capital and sales or receipts, is reasonable and proper for the purposes of taxation, and wholly unobjectionable from the standpoint of the Constitution. The precise classification, however, should be just, and not confiscatory, and should be the result of careful and most deliberate investigation and study of the various business interests of the country. Excessive profits from the

use or abuse of special privileges and public utilities—even of patent rights—may thus be reduced and returned to the public. A just and proper return upon all capital may be, in effect, prescribed and limited by the imposition of this tax, *measured* in these ways, and a control may be exercised over the business of the country and the employment of capital which must satisfy the people.

Through wise and skilful graduation of the tax, it may not only be made possible for the small business to compete with the great aggregations of capital in the same business, but also be made impossible for the great capitalists to compete with the small; for, owing to the lighter burden of the tax, the latter should be enabled constantly to undersell or underbid the former. As a result, the overgrown consolidations would be forced to split up, and we should enter upon *a more healthy era of comparatively small dealers,* the goal toward which the people are now looking. No excessively capitalized business and no so-called overgrown "trusts" could possibly exist for any length of time, and pay a profit, under the burden of such a tax, when properly graduated and laid.

Such a fee or tax would not lead to an increase of prices, with a view of imposing its burden upon the consumer, because the motive therefor is wholly removed by the progressive feature of the tax, since the greater the prices and the returns on gross sales or receipts, the greater will be the tax. Practically speaking, therefore, the burden of such a tax can never be made to fall on the consumer.*

Indeed, it is by no means certain that, apart from an interstate-commerce license fee, Congress might not lay an excise duty on the *business* of *all* dealers and manufacturers, graduated and progressive in amount, and measured by gross sales. Such a tax should be so framed as plainly to constitute an excise or indirect tax, and not a direct tax.

The single expedient of an interstate-commerce license fee may, of course, be accompanied by all of the necessary regulations, in the matter of capitalization, reports, publicity, inspection and visitation, which the wisdom of Congress may devise as requisite to accomplish the result aimed at. That result, pri-

* While this article was in press, the legislature of the State of Texas undertook to pass an extremely radical bill taxing gross receipts.

marily the regulation of the use, and the prevention of the abuse, of wealth, will thus be brought about without committing the country to any new or untried theories, socialistic, anarchistic or individualistic, and without disturbing the rights of property, or interfering with the course of nature in respect to reasonable consolidation and combination. Then, too, as a scheme of taxation, it will always be perfectly elastic, and easily adjustable at all times to meet changes in conditions, and to remedy any injustice through proportionate inequality of burden or otherwise.

If, without adopting new and untried theories in radical legislation, Congress really wants a remedy for existing conditions, and really and earnestly desires to satisfy a just public demand and to remedy admitted evils bearing sorely upon the people, let it set to work on these simple lines, and all will be well.

As bearing upon this problem of wealth, we cannot overlook the present agitation as to the railroad situation and, generally, as to our public utilities and public-service corporations. Here, again, we are passing through a stage of development. We are aiming toward the general welfare, but that does not necessarily mean immediate public ownership, because, until public men and the people at large have been so trained and educated by the friction of years, perhaps of generations, that the public can be given a service as efficient and economical as that furnished by individuals under the incentive of reasonable private gain, there is no excuse or justification for public ownership and operation, and, from the standpoint of the people's welfare, it falls little short of a crime seriously to advocate it, at this time, as a practical proposition. The people, however, are entitled to assure themselves, by proper regulation, that the service is efficient, and the private profit derived from such utilities is only just and reasonable; and this may effectively be done through skilled and expert commissions. In this way, rates, with other charges and details of operation, may be advantageously regulated and fixed, and, speaking from experience, there is no doubt as to the practical desirability of such regulation. But the regulating body must be highly skilled and very highly paid. We have no *such* commissions or bodies now in existence. Political expediency at present plays too constant a part in their selection. To speak the truth, we are to-day, as a people, perhaps hardly ripe even for proper and effective regulation of this sort. We are still

immature, and must work out, for a much longer period, the mistakes and experiments of youth. Let it be understood, however, that such commissions are not lawmaking bodies. They are merely executive agencies, to "take care that the laws be faithfully executed," and, as such, are bodies which must be responsible solely to the Chief Executive, and for which he alone must in turn be responsible to the people. A consideration of this legal and logical condition will remove many misconceptions.

In these ways shall wealth be made to bear its proportionate burden, its special opportunities be curbed, and the opportunities of all be more nearly equalized, for thereby the returns from the employment of wealth may be absolutely limited, and its inordinate increase may be satisfactorily controlled. Thus, also, shall the possessors of wealth be secured in their property rights by the conservative good sense of our people, who will then be assured that, at last, wealth is paying to the community what it owes for the privilege of withdrawing its large share from the common stock, and for that protection of its private ownership which the community has been pleased to accord. Such is the reciprocal effect of the imposition and satisfaction of a just obligation.

Again, why not use the national taxing power to regulate evil insurance practices? Neither the interstate commerce nor any other power of the Federal Government, other than the taxing power, can operate directly upon insurance. If, for instance, deferred dividends and tontine insurance, with the abuses resulting from a consequent overgrown surplus, be deemed to be evils, why not tax all companies issuing such policies, prohibitively, through an excise tax? The burden upon the individual policyholder would be only trifling, incidental and temporary, and would be wholly justifiable. With such a tax imposed, competition between the companies would soon regulate the abuses. Or, proceeding indirectly, why not deny access to the Federal Courts and deny the use of the post-offices to insurance companies which shall fail to comply with a Federal insurance law prescribing remedies for such recognized abuses—a perfectly proper use of Federal power?*

It is well settled that, in the exercise of a recognized power,

* Recently, since this was written, it has been elsewhere suggested, but only with a limited application, that use of the post-office be refused. There need be no limit on the effective exercise of that power.

the motives of Congress for the enactment of the legislation in question are not to be inquired into, and are immaterial. The motive may involve the destruction of the subject-matter, but the legislation must be taken at its constitutional face value. We naturally recall, in that connection, the tax on State bank issues and the oleomargarine tax—both touching on the States' rights and powers most intimately, and both acting, as Congress intended, prohibitively and destructively on the subject-matter.

As to the divorce evil, for example, while exercising great care not to cast a burden upon the judicial power of the States, why not exact from the plaintiff a license fee—not so heavy as to be prohibitive, but sufficient in amount to prevent haphazard and thoughtless action—and also provide, in the exercise of the power (conferred by Article IV, Section 1, of the Constitution) to prescribe the "*effect*" which shall be given to the acts, records and proceedings of the several States, that the decree of divorce shall have *no "effect," and shall be unenforceable,* outside of the State by whose court it was rendered, until the plaintiff shall have paid such Federal license fee, *and unless* the divorce shall have been granted for such causes, and after such a period of residence, and upon such service of process, as Congress shall prescribe, or *unless all other conditions, formulated by Congress, shall have been complied with?*

Will it be said that, in this manner, the Nation will absorb the police power of the States, that, eventually, they may have no part to play in the national drama, and that home rule will become a farce? Hardly so, for the States will always be what, in analogy to town and county governments, well understood by them, the framers of the Constitution intended them to be, that is to say, primarily and ultimately, the instruments for purely local government and for home rule, on a larger scale, in the communities within their several jurisdictions. It is a striking error to assume that the passing of States' rights, as formerly understood, precludes the possibility of self-government or home rule. On the contrary, the future function of the State, as the instrument for home or local government, is fixed and determined. Of course, we must not forget that what was distinctly local, a generation ago, may now be a matter of national concern. That is natural development. The fading away of the ancient States'-rights doctrine (which is really merely the

elimination of State differences—due to our existing *homogeneity* —in matters affecting the "*general welfare*") has nothing to do with the virile assertion of *State sovereignty,* for the preservation of our dual system is absolutely essential to the proper development of real home rule and of the best national spirit. At the same time, it has always been recognized that even State sovereignty must be sacrificed to the *happiness of the people.**

Time and space will not permit the enlargement of these suggestions as to remedies, but they are capable of almost indefinite extension, for there is no recognizable limit to the national life, and to the legitimate and proper exercise of the national functions *under the Constitution.* It is a *Constitution* of general principles, not an ephemeral statute of infinite detail, under which we live, and, with the growth of the tree, the protecting bark is constantly stretching and accomodating itself to the new conditions.†

These discussions and problems of the moment need not disturb us, for love of country has become our bulwark. We are a *Nation,* not a confederation, and the future is now secure. As with the fathers, so with us. The "stepping-stones of" our "dead selves" reach up to higher spheres of national action. God lives. Let us have faith.

WILLIAM V. ROWE.

* Madison, in the Federalist—Lodge's Ed., page 287—XLV.

† "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a Government *its language is general, and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable.* This in no manner abridges the fact of its changeless nature and meaning."

South Carolina vs. *U. S.*, 199 U. S., at pp. 448–9 (1905).

Due to pardonable misunderstanding on the part of laymen (and misconceptions on the part of lawyers, even) some most enlightened and timely expositions of this settled principle, in its application to present-day conditions and the desirable enlargement of these Federal powers, because making for efficiency, have recently been unjustly and severely criticised on the ground that they suggest something new—a radical executive coercing of constitutional constructions from the Supreme Court, a packing of the Court, etc. On the contrary, they have uttered and applied only this very old thought and principle, in a perfectly legitimate and praiseworthy manner. *Constructions* of the Constitution must always be sought, when *new conditions,* from time to time, demand *new applications* of its *fixed principles.* If there be no principle in the Constitution applicable to such conditions, or if the people desire changes, of course, resort must be had to the power of amendment. No sane man could ever state or think anything else.